Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

STEPHEN S. PACKARD,

Petitioner,

v.

CONTINENTAL AIRLINES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED

1. What does the Family and Medical Leave Act ("FMLA") mean when it states that it prohibits employers from interfering with, restraining, denying the exercise of or the attempt to exercise any rights provided under the FMLA to employees?

2. What does the FMLA mean by the term "willful violation," proof of which will allow an employee to access a three-year statute of limitations?

3. What does the FMLA mean when it states that civil actions must be brought within two years, [or, in the event of a willful violation, three years], of the date of the "last event" constituting the alleged violation for which action is brought?

4. Do the equitable doctrines of continuing violation, equitable estoppel and equitable tolling apply to the FMLA statute of limitations?

PARTIES TO THE PROCEEDINGS

Petitioner is Stephen S. Packard.

Respondent is Continental Airlines, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Tenth Circuit opinion (App. A) is not yet (and may not be) reported.

The district court opinion (App. B) is not reported.

STATEMENT OF THE BASIS FOR JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was entered on December 19, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654.

STATEMENT OF THE CASE

A. Nature of the Case

The purpose of the federal Family and Medical Leave Act ("FMLA"), 29 U.S.C. § 2601, et seq., is to allow an employee to be able to take a leave to care for his own serious illness, or to care for a family member who is seriously ill, or to attend to the birth of a child, without losing his or her job.

Steve Packard wanted to be able to take a leave to make arrangements for the long-term care of his ill mother so he could relocate from Salt Lake City to Houston and not lose his job as a flight attendant with Continental Airlines. The FMLA provided Mr. Packard a way of doing both. But Continental engaged in actions and inactions which interfered with Mr. Packard's ability to do so. At first, Continental refused Mr. Packard's requests for leave. As a result, Mr. Packard was forced to request an "early out retirement." After receiving Mr. Packard's papers to request an "early out," Continental then informed Mr. Packard that he possibly could take a leave under the FMLA. By that time, Mr. Packard had already sent in his request form. So he tried to rescind his request form/persuade the company to not approve his request form so he could take the FMLA leave that was now being offered him. Continental could have allowed Mr. Packard to take the leave it was offering him and not lose his job. All it had to do was allow Mr. Packard to rescind his early out request and to not accept or approve such early out request. Continental could have done so up until September 29, 1994, when Continental approved Mr. Packard's request form or until Mr. Packard's last day

of work, September 30, 1994. It was only after September 30, 1994, that Continental issued a letter that indicated Continental would process Mr. Packard out of the company in mid-October 1994.

On September 17, 1997, Mr. Packard filed a civil action alleging his employer, Continental Airlines, violated the FMLA from May 1994 to September 30, 1994 when it failed to notify him about the availability of FMLA leave, when it failed to offer him FMLA leave, when it refused to grant his requests for leave and, then, after he had requested an "early out," when it invited him to inquire about the possibility of using FMLA leave but did not allow him to rescind his request for an early out. Mr. Packard alleged Continental interfered with his ability to take meaningful leave under the FMLA by refusing to allow him to revoke his request to participate in the early out (which election he had made because he couldn't get Continental to grant him a leave in the first place). Mr. Packard alleged such a pattern constituted an interference by his employer with his rights, in violation of the non-interference provision of the FMLA.

This case involves the interpretation of four specific terms in the FMLA: (1) what does the FMLA mean by the prohibition on an employer "interfering" with an employee's rights under the Act?; (2) what does the FMLA mean by the term "willful violation," providing a complainant with access to a three-year statute of limitation?; (3) what does the FMLA mean when it states the statute of limitations runs from the "last event" constituting the violation?; and (4) should the FMLA be interpreted to allow equitable estoppel and equitable tolling?

As to these four issues, Mr. Packard argued that if an employer knows (or should be charged with knowledge) that an employee has decided to leave the employer's employ because such employer has refused to provide the employee with FMLA leave and then the employer changes its position and agrees to allow the employee to access FMLA leave but does not allow the employee the right to change his decision to leave the employer's employ, such interference should be viewed as interfering with an employee's efforts to access his rights under the FMLA. Mr. Packard also argued that such a pattern should be viewed as willful and lasting until the very last day of that employee's employment, entitling such an employee to access the three-year statute of limitations.

Simply put, Mr. Packard's contention is that denying him leave until he made his early out request and then offering him FMLA leave only *after* he had made his request, which request he had made only because he couldn't get Continental to respond to his pleas for leave in the first place, but then not allowing him to rescind his early out request so that he could go ahead and take the leave now being offered him without losing his job, is interference with and manipulation of his right to take a meaningful leave consistent with the purpose of the FMLA. Mr. Packard's contention is such course of dealing was intentional and willful – manifesting knowing or reckless disregard for Mr. Packard's rights – triggering the three-year statute of limitations, 29 U.S.C. § 2617(c)(2), and that that last event constituting such interference continued until Mr. Packard's last scheduled flight on September 30, 1994.

Mr. Packard contended that a jury could decide that these facts constituted interference of a willful nature and that such interference continued up until his last day of work, September 30, 1994, thus, making a September 17, 1997 filing timely within the three-year statute of limitations.

B. Proceedings Below

After discovery, Continental filed a motion for summary judgment on Mr. Packard's FMLA claims, arguing, among other things, that Mr. Packard's claims were time barred by the statute of limitations contained in the FMLA.

The District Court granted Continental's motion for summary judgment and dismissed Mr. Packard's claims under the FMLA in their entirety with prejudice.

Mr. Packard appealed only from that part of the trial court's order and judgment dismissing his FMLA claims. (He had also filed claims under the Age Discrimination in Employment Act but did not pursue those claims further.)

Mr. Packard appealed pursuant to 28 U.S.C. § 1291.

On December 19, 2001, the Court of Appeals for the Tenth Circuit affirmed, holding that Mr. Packard's claim arose in May 1994 and that under either the two-year or three-year statute of limitations, Mr. Packard's case was filed beyond the date of the violation.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court Needs to Provide Guidance as to What Constitutes "Interference" With an Employee's Rights Under the FMLA.

A. The Language of the Statute

29 U.S.C. § 2615(a)(1) of the FMLA provides "it shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or attempt to exercise any right provided under this title." See also the FMLA regulations at 29 C.F.R. § 825.220(a): "The FMLA prohibits interference with an employee's rights under the law . . . More specifically, the law contains the following employee protections:

> (1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act."

See also the FMLA regulation at 29 C.F.R. § 825.220(b):

> . . . "Interfering with the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under the FMLA. . . . "

B. The Facts as to Interference and Manipulation

Mr. Packard contended that Continental's actions in refusing to allow Mr. Packard to rescind his request form so he could use FMLA leave without losing his job should

be viewed as interfering with Mr. Packard's exercise of his rights under the FMLA. If, after Mr. Packard had made his early out request, he then took the leave which Continental was then, and only then, offering, he would still lose his job, unless, of course, Continental allowed him to rescind his early out election. Mr. Packard contended that a reasonable jury could conclude that in Mr. Packard's case, Continental manipulated matters so that it could downsize its workforce by one more flight attendant (in the face of closing the Denver crew base) and yet still act like it was complying with the law. Compare *Williams v. Shenango*, 986 F.Supp. 309 (W.D. Pa. 1998) (employee requested leave, employer denied it and suggested the employee take leave at a later date, district court held that if an employer's response would chill or otherwise discourage an employee's assertion of his rights under the FMLA, such discouragement could constitute "interference" and denied summary judgment).

Thus, Mr. Packard complained that Continental interfered with his ability to access meaningful FMLA leave. Compare *Williams v. Shenango*, 986 F.Supp. 309 (W.D. Pa. 1998) at 321: "reasonable persons could conclude that the initial denial of leave and the suggestion of rescheduling leave may, in fact, constitute 'interference with' FMLA rights."

The Tenth Circuit did not consider this course of action to be "interference." Yet it seems to be so.

If an employee decides to resign his employment *independent of any reasons tied to a need for FMLA leave*, he shouldn't be allowed to try to change his mind and revoke his resignation by, *after resigning*, requesting

FMLA leave. In those situations where the employee has not previously requested leave or where the employee has conveyed no information to the employer to put the employer on notice about a need for leave and does so only *after* resigning, that's the right result. Any other conclusion would be grossly unfair to employers. But that is not the instant case.

If, however, an employee resigns because he can't get leave and needs it and that is why he resigns, why shouldn't he be allowed to argue that if his employer then offers the employee access to FMLA leave but doesn't allow the employee to rescind his resignation so that his use would be meaningful, such might constitute interference with the employee's FMLA rights? To invalidate such a claim might pose too big of a temptation to an unscrupulous employer.

A per se rule to the effect that when an employee resigns (regardless of the reasons), such a resignation cuts off all his rights under the FMLA is too broad. It doesn't take into consideration the situation of the employee who asks for and can't get leave and, as a result, is forced to resign. Should an employer be able to escape liability by *then* offering to the employee the opportunity to take FMLA leave and yet not allow the employee to rescind his resignation? Such an offer would be meaningless and inconsistent with the whole concept of the FMLA. The employee still loses his job. That is not the right result.

Mr. Packard didn't want to lose his job. The only reason he submitted his request form was because he couldn't get Continental to grant him leave, even though with the closure of the Denver crew base, Continental

was laying off hundreds of flight attendants. After he requested the early out, Continental offered him the possibility of qualifying for FMLA but wouldn't allow him to revoke his request form. Continental's actions and inactions could be viewed as "interference" and "manipulation." Interference is a violation of the FMLA. If such interference is willful, then it is a willful violation, triggering the three-year statute of limitations.

The instant case provides the Supreme Court with the opportunity to define and interpret what "interference" and "manipulation" mean in the context of the FMLA.

II. The Supreme Court Needs to Provide Guidance As to What the Term "Willful" Means in the FMLA Statute of Limitations.

A. The Language of the Statute

The statute of limitations contained in the FMLA provides that civil actions must be brought within *two years* after the date of the last event constituting the alleged violation for which action is brought. 29 U.S.C. § 2617(c)(1). The FMLA also provides that in the case of a *willful* violation, the action must be brought within *three years* of the date of the last event constituting the alleged violation for which such action is brought. 29 U.S.C. § 2617(c)(2).

This longer statute of limitations makes for a three-part inquiry: (1) what is the alleged violation for which such action is brought?; (2) what is the test for establishing a willful violation?; and (3) when is the last event constituting the willful violation?

As set forth above, in the instant case, the alleged violation is interference.

Mr. Packard contends one violation occurred during May 1994 through August 1994 when he tried to get help in the form of requesting a leave of absence from Continental and Continental kept denying such request for leave. Mr. Packard did not receive Mr. Risoli's letter which first mentioned the FMLA and informed Mr. Packard that he might be able to take FMLA leave (which was postmarked August 27, 1994) until roughly the very end of August or the first part of September 1994. Mr. Packard acknowledges that, absent equitable considerations, the statute of limitations has likely run on this violation.

But Mr. Packard contends a second violation occurred *after* he had made his early out request – namely, that when Mr. Risoli did send him his letter informing him about the possibility of using FMLA leave and Mr. Packard then tried to get Continental to rescind his request form so he could use the FMLA leave that Continental was now suggesting he inquire about using, that Continental refused to allow him to rescind his request form so as to be able to have his use of FMLA leave be meaningful. Mr. Packard was never informed of FMLA prior to Mr. Risoli's letter and contends this second violation was an "interference" with his rights under the FMLA and was willful.

The next question is what does "willful" or "willfulness" mean under the FMLA. Inasmuch as the statute of limitations in the Fair Labor Standards Act ("FLSA") is the model for the statute of limitations in the FMLA, see *Settle v. S.W. Rodgers Co., Inc.*, 998 F.Supp. 657 (E.D. Va.

1998), it may be useful to briefly examine how the courts have defined the term "willfulness" in the FLSA. As used in the FLSA, "willful" has been interpreted to mean that the employer *knew* that the Act prohibited its conduct or that the employer showed reckless disregard as to whether the Act prohibited its conduct. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 100 L.Ed 2d 115, 108 S.Ct. 1677 (1988). *Reich v. Monfort*, 144 F.3d 1329, 1334 (10th Cir. 1998). *Carter v. Rental Uniform Service of Culpepper, Inc.*, 977 F.Supp. 753 (W.D. Va. 1997) at 759.

B. The Facts as to Willfulness

Mr. Packard contended the facts as to Continental's actions and inactions raised a genuine issue of material fact as to willfulness.

The conduct Mr. Packard was complaining of was the fact that Continental did not notify him of the availability of FMLA leave before he made his early out request and, then, only after Continental obtained his early out request (which Mr. Packard submitted because he couldn't get Continental to grant him leave), did it then notify him of the availability of FMLA leave. Yet, when he then tried to rescind his request so he could use the leave he was now being invited to qualify for and not lose his job, Continental refused to allow him to do so. Mr. Packard contends that was an act of interference.

Was that interference willful? Yes. It is undisputed that Mr. Packard had requested leave in early 1994 and that Continental denied him leave in May 1994. It is also undisputed that *because* Mr. Packard could not get Continental to grant him leave, he decided in August 1994 to

submit a request for an early out. It is also undisputed that *after* he made his early out request, Continental then invited him to inquire about FMLA leave. It is also undisputed that after being so notified, Mr. Packard's actions were focused on revoking or rescinding his early out request so he could then exercise his FMLA leave and not lose his job. It is also undisputed that although Mr. Packard had requested the early out, Continental had the choice of whether to accept it or not accept it, and had that choice until Mr. Packard's last flight on September 30, 1994.

Mr. Packard contended these facts, viewed in the light most favorable to Mr. Packard, could support an inference that such action on the part of Continental was interference with his FMLA rights and that such interference was not just accidental or negligent but deliberate, calculated and willful.

The Tenth Circuit considered this course of conduct to be negligent but not willful on the part of Continental. Yet it seems to be more than negligent.

Continental knew that Mr. Packard wanted to use FMLA leave. Continental knew why he wanted to use it. Continental knew that Mr. Packard wanted to rescind his early out request to be able to use FMLA leave and not lose his job. But Continental refused to allow him to do so.

A jury could reasonably infer and conclude that such refusal constituted interference with his rights under the FMLA and that such interference was willful.

The instant case provides the Supreme Court with the opportunity to define and interpret what "willful" means in the FMLA. If the alleged violation is interference, can you have negligent interference or is interference by its very nature willful?

III. The Supreme Court Needs to Provide Guidance As to What the Phrase "the Last Event Constituting the Alleged Violation for Which Such Action is Brought" Means.

A. The Language of the Statute

The FMLA clearly states that the statute of limitations begins to run as of the date of the *last* event constituting the alleged violation. 29 U.S.C. § 2617(c)(1) and (2). This is the same test whether the statute is two years or three years. Thus, the question is what is *the* violation and what is the *last event* constituting that violation?

B. The Facts as to the Violation

The Tenth Circuit did not directly address this question. The Tenth Circuit viewed the violation as consisting of the Continental supervisor not informing Mr. Packard of the availability of the FMLA in May 1994. Thus, the Tenth Circuit determined that when the Continental supervisor later informed Mr. Packard of the FMLA in late August 1994, Continental corrected the error. (The Tenth Circuit did not view Continental's refusal to allow Mr. Packard to revoke his early out request as interference and, thus, a second violation.) Had the Tenth Circuit considered the sequence of events to constitute interference, it then would have had to face the question of when

was the last event constituting the alleged interference for which the civil action was brought and determine whether that course of interference continued until Continental actually accepted Mr. Packard's early out request and Mr. Packard ended his employment.

Mr. Packard contended this triggering violation was interference and that the events constituting this violation continued until September 29, 1994, when Continental finally accepted his early out request form or until his very last flight, September 30, 1994, when he was signed out under his strong protests.

Such a situation of interference exists as long as that employer can rescind a resignation (or decline to accept/approve an application for an early out). This interference continued as long as Mr. Packard was employed with Continental, up to September 30, 1994, because Mr. Packard was continuing to ask for help even up to his last flight.

In the instant case, when Sam Risoli wrote his letter of August 19, 1994, Mr. Packard had submitted his request but Continental had not acted on, accepted or approved Mr. Packard's early out request. Continental's ability to let Mr. Packard take FMLA leave and not lose his job continued until it acted on Mr. Packard's request or until Mr. Packard's last flight on September 30, 1994.

Mr. Packard contended that a reasonable jury could find such to be interference with Mr. Packard's rights under the FMLA and a willful interference at that, which willful interference continued until September 30, 1994 and beyond, thus, making a September 17, 1997 filing timely.

The instant case gives the Supreme Court the opportunity to give the lower courts guidance as to whether under these circumstances the last event continues as long as the employee is employed and seeking to rescind a resignation or early out election.

IV. The Supreme Court Needs to Provide Guidance As to Whether Equitable Estoppel or Equitable Tolling Should Apply to the FMLA.

A. The Statute

The FMLA does not expressly contain provisions for tolling the statute of limitations such as the continuing violation doctrine, equitable estoppel or equitable tolling.

To guide its adjudication of Mr. Packard's arguments the Tenth Circuit borrowed from parallel precedent in other employment cases. Compare *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 160 note 4 (1st Cir. 1998) (although the FMLA did not explicitly make it unlawful to retaliate against an employer for exercising his rights under the Act, it was clearly intended to provide such protection).

B. The Facts as to Equitable Considerations

Mr. Packard complained of a systemic continuing violation. This systemic violation was Continental's failure to respond to his requests for leave until only *after* he had made a request to leave the company and then, once having obtained Mr. Packard's request, offering Mr. Packard leave but not allowing him to rescind his request.

After he submitted his early out election, Mr. Packard continued to work for almost two full months and for the last month of those two months, actively sought to persuade the company not to accept his earlier tendered request form so he could use the leave Continental was now offering to make arrangements for the care of his mother, relocate from Salt Lake City to Houston and not lose his job.

This interference "continuing violation" continued until September 30, 1994. Continental's failure to allow Mr. Packard to rescind his early out request so he could take a leave and not lose his job and his requests and protests continued every day after August 19, 1994, until September 30, 1994.

The Tenth Circuit did not view the facts as constituting interference so did not reach the issue as to whether the date of the last event of such interference was his last day of employment. But the statute provides that the statute runs from the last event constituting the alleged violation. This seems to imply that the normal rules as to the continuing violation doctrine do not apply to the FMLA.

The Supreme Court should take the opportunity to harmonize the continuing violation doctrine with the statutory language that the statute of limitations begins to run from the last event constituting the alleged violation.

The Tenth Circuit implied that equitable estoppel and equitable tolling might apply to the FMLA but found the facts did not satisfy equitable estoppel or equitable tolling.

The Supreme Court should take the opportunity to explain if and under what circumstances equitable considerations apply to the FMLA statute of limitations.

As to equitable estoppel, Mr. Packard continued to communicate with Continental after September 1994 about the predicament in which he had been placed. In fact, those discussions culminated in a meeting in Houston between Mr. Packard and Continental Vice President, C.D. McClean, and Continental Vice President, Debbie McCoy, in mid-1996. This course of conduct led Mr. Packard to believe that Continental might very well correct the situation. It was not until this possibility did not result in resolution that Mr. Packard turned to the courts.

CONCLUSION

The instant case presents several issues critical to the proper administration of the FMLA: What actions constitute "interference" with rights under the FMLA? What does "willfulness" mean in the FMLA? When is the "last event" constituting an interference under the FMLA? Is the FMLA statute of limitations subject to equitable estoppel and equitable tolling?

These are questions of importance to all employers subject to the FMLA and the millions of employees covered by the FMLA. The Court's granting of the petition would enable it to give necessary guidance as to how this relatively new statute should be interpreted. This Court should reverse summary judgment on Mr. Packard's

FMLA claims and allow the case to proceed to trial on the issue of willful interference.

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A Opinion of the United States Court of Appeals for the Tenth Circuit, dated and filed December 19, 2001

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEPHEN S. PACKARD, Plaintiff-Appellant, v. CONTINENTAL AIRLINES, INC., Defendant-Appellee.	No. 01-4013 (D.C. No. 97-CV-737) (D. Utah)

ORDER AND JUDGMENT*

(Filed Dec. 19, 2001)

Before **HENRY**, **BARRETT**, and **BRISCOE**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Plaintiff Stephen S. Packard appeals from the district court's order dismissing, as time barred, this action brought pursuant to the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601-2654. We agree with the district court that this action is barred by the statute of limitations and affirm.

I. Facts

Mr. Packard began working as a flight attendant for Frontier Airlines in 1976. In 1986, defendant Continental Airlines acquired Frontier. Mr. Packard continued his career with Continental. He lived in Salt Lake City, but was based in Denver, working international flights – usually Denver to London. In 1990, due to cutbacks, Mr. Packard's usual flight was reassigned to Houston. Mr. Packard transferred his base to Houston, but continued living in Salt Lake City. Further flight cutbacks greatly impacted his ability to get to Houston for his flights.

Mr. Packard considered transferring to Houston. However, his mother had had cardiac bypass surgery approximately eighteen months before and was experiencing a slow recovery due to a series of minor strokes. Mr. Packard requested a leave of absence so he could arrange for her continuing care, after which he planned to move to Houston. That leave was denied.

Mr. Packard then decided to apply for the early-out program defendant was offering its employees. He submitted a signed application asking to be released as soon as possible so he could care for his mother. At that point, he received a letter advising him of his rights under the

FMLA and encouraging him to explore the possibility of taking FMLA leave. Mr. Packard asked to rescind his early-out application, but did not apply for FMLA leave. Apparently, Mr. Packard decided that he first had to rescind his early-out decision before applying for FMLA leave. Defendant would not permit him to rescind the decision. He last worked for defendant September 30, 1994.

II. Procedural History

Mr. Packard commenced this action in district court September 17, 1997. He alleged that defendant violated the FMLA by (1) failing to post notices to employees of their rights under the FMLA, (2) failing to inform him personally that he was entitled to apply for FMLA leave, and (3) "coercing" him to elect to participate in the early-out program and then, after he had learned of his rights, refusing to permit him to rescind that decision. The district court dismissed the action with prejudice holding that the two-year statute of limitations governed this action and, thus, the filing was untimely. The court concluded that the three-year statute of limitations applicable for willful violations did not apply.

Mr. Packard contends his action was timely as defendant's actions were willful and the three-year statute applies and began to run on his last day of work. Defendant counters that even should the three-year statute apply, it began running, at the latest, on August 19, 1994, when Mr. Packard was informed he should explore the possibility of taking FMLA leave. Thus, defendant maintains that this action is untimely under either limitations

period. Mr. Packard admits his action is untimely should the two-year statute control.

II. Controlling Law

We review the district court's ruling regarding the applicability of a statute of limitations de novo. *Indus. Constructors Corp. v. U.S. Bureau of Reclamation,* 15 F.3d 963, 967 (10th Cir. 1994).

Section 2617(c)(1) of the FMLA provides that actions alleging violations of the FMLA must be brought within two years of the alleged violation. However, § 2617(c)(2) provides that if the FMLA action alleges a willful violation, the action must be brought within three years of "the last event constituting the alleged violation for which such action is brought."

The FMLA does not define the word "willful." However, the Supreme Court has stated that the word "is generally understood to refer to conduct that is not merely negligent." *McLaughlin v. Richland Shoe Co.,* 486 U.S. 128, 133, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988). The plaintiff must show "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute. . . . " *Id.*

III. Analysis

A. Statutory Violation

Mr. Packard has shown, at best, negligence on the part of defendant. He has failed to show that defendant wilfully disregarded its duties under the statute. Even if

we were to consider willful his supervisor's failure in May 1994 to tell him of the possibility of FMLA leave, that act occurred over three years before Mr. Packard filed this action.

B. Tolling/Continuing Violation

Mr. Packard argues his claim did not arise until September 30, 1994, his final day at work. He urges that even if his supervisor's actions in May 1994 are determined to be the defendant's willful act which violated the statute, we should decide that his action was still timely either because the continuing violation doctrine preserved his cause of action or because the statute of limitations was tolled until September 30.

The FMLA does not contain provisions for tolling the statute of limitations nor does it address the continuing violation doctrine. While we do not decide here that these doctrines apply to violations alleged under the FMLA, we will borrow the analyses presented in Title VII actions to guide our discussion of Mr. Packard's arguments. *See, e.g., Blankenship v. Buchanan Gen. Hosp.*, 999 F.Supp. 832, 838 (W.D. Va. 1998) (applying equitable estoppel discussion from ADEA and Title VII case law to guide its analysis in FMLA case).

"The continuing violation doctrine is premised on the equitable notion that the statute of limitations should not begin to run until a reasonable person would be aware that his or her rights have been violated." *Martin v. Nannie & Newborns, Inc.*, 3 F.3d 1410, 1415 n. 6 (10th Cir. 1993). Thus, a continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable

diligence should have known, he was being discriminated against at the time the earlier events occurred. *See id.* Mr. Packard knew by August 19, 1994, that he could apply for leave under the FMLA.

We cannot accept Mr. Packard's argument that the statute of limitations should be tolled until his last day at work. We have "recognized equitable tolling of . . . time limitations only if the circumstances of the case rise to the level of active deception which might invoke the powers of equity to toll the limitations period. For instance, equitable tolling may be appropriate where a plaintiff has been lulled into inaction by [the actions of others]." *Biester v. Midwest Health Servs., Inc.*, 77 F.3d 1264, 1267 (10th Cir. 1996) (quotations omitted).

While, arguably, Mr. Packard's supervisor erred by not informing him of the availability of the FMLA, that error was corrected on August 19, 1994. Thus, even if his supervisor actively misled Mr. Packard, his case was still filed beyond the statute of limitations.

IV. Conclusion

Under either the two-year or the three-year statute of limitations, Mr. Packard's case was filed beyond the controlling date. We AFFIRM the judgment of the United States District Court for the District of Utah.

Entered for the Court

Robert H. Henry
Circuit Judge

Appendix B Order of the United States District Court for the District of Utah, dated January 11, 2001 and filed January 11, 2001

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Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

STEPHEN S. PACKARD Plaintiff, v. CONTINENTAL AIRLINES, INC., Defendant.	**ORDER OF DISMISSAL WITH PREJUDICE** Civil No. 2:97-CV-00737 Judge: Ted Stewart (Filed Jan. 12, 2001)

During a hearing that began at 3:00 p.m. on September 28, 2000, the Court heard argument on (1) Defendant's motion to dismiss Plaintiff's claim of age discrimination and (2) Defendant's motion for summary judgment on Plaintiff's claim under the Family Medical Leave Act. David Holdsworth appeared and made argument on behalf of Plaintiff Stephen Packard, and Frederick R. Thaler and Paul C. Burke appeared and spoke on behalf of Defendant. Having received and considered memoranda on both motions from both parties, the Court

first heard oral argument on the motion to dismiss Plaintiff's age discrimination claim. The Court orders as follows:

1. This Court has subject matter jurisdiction over Plaintiff's claim under the Age Discrimination Employment Act ("ADEA") and thus may decide Defendant's motion to dismiss based on the claim's untimely filing.

2. Plaintiff's ADEA claim must be dismissed because Plaintiff did not file a timely charge of discrimination with an administrative agency as required by the Age Discrimination in Employment Act.

3. Furthermore, Plaintiff is not entitled to equitable tolling or equitable estoppel to extend the time for the filing of a charge of discrimination because Plaintiff did not plead any facts suggesting that an administrative agency actively deceived him or lulled him into inaction. In addition, Plaintiff's application for equitable tolling or equitable estoppel lacks merit because, more than 300 days before he finally filed his untimely charge of discrimination, Plaintiff consulted with an attorney, retained counsel, and filed a separate lawsuit based on the same operative facts.

4. Accordingly, Plaintiff's ADEA claim is dismissed in its entirety with prejudice.

5. The three-year statute of limitations for willful violations of the FMLA is inapplicable to Plaintiff's claim because, even viewing the facts in the light most favorable to Plaintiff, there are no facts indicating that Defendant showed a reckless disregard for Plaintiff's FMLA rights. As a result, the timeliness of Plaintiff's FMLA

claim is governed by the Act's two-year statute of limitations.

6. Plaintiff's FMLA claim is time-barred under the Act's two-year statute of limitations because Plaintiff waited more than two years before commencing this lawsuit.

7. Even if there were evidence of a willful violation that would trigger the three-year statute of limitations, Plaintiff's FMLA claim is still time-barred.

8. Accordingly, Plaintiff's claim under the Family Medical Leave Act ("FMLA") is dismissed in its entirety with prejudice.

9. All claims in this consolidated action are therefore dismissed with prejudice.

The Court therefore ORDERS the entry of judgment in favor of Defendant, thereby dismissing with prejudice all claims in the above-captioned lawsuit.

DATED this 11th day of ~~October, 2000~~ January, 2001.

BY THE COURT:

/s/ Ted Stewart
THE HONORABLE
TED STEWART

APPROVED AS TO FORM:

/s/ David J. Holdsworth
DAVID J. HOLDSWORTH
Attorney for Plaintiff

United States District Court
for the
District of Utah
January 19, 2001

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:97-cv-00737

True and correct copies of the attached were either mailed or faxed by the clerk to the following:

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United States District Court

Central Division for the District of Utah

Stephen S. Packard

v.

Continental Airlines Inc

JUDGMENT IN A CIVIL CASE

(Filed Jan. 24, 2001)

Case Number: 2:97cv737 ST

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that judgment be entered in favor of the defendant and plaintiff's cause of action is dismissed with prejudice.

January 24, 2001
Date

Markus B. Zimmer
Clerk

/s/ Louise York
(By) Deputy Clerk

United States District Court
for the
District of Utah
January 25, 2001

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 2:97-cv-00737

True and correct copies of the attached were either mailed or faxed by the clerk to the following:

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